



Australian Government
**Australian Building and
Construction Commission**

6 December 2017

JS

By email: foi+request-4122-49ab3883@righttoknow.org.au

Dear JS

Freedom of Information Request – Decision

By email dated 7 October 2017 you wrote to the Australian Building and Construction Commission (**the ABCC**) and sought access to documents under the *Freedom of Information Act 1982* (**the FOI Act**). Your request was in the following terms:

I seek access under FOI to the document referred to in an article entitled, 'No regrets': Turnbull's building watchdog Nigel Hadgkiss says his last goodbye" published in the Sydney Morning Herald on 27 September 2017. The document I seek is the document described in the article as a letter to colleagues on his final day as head of the Australian Building and Construction Commission.

(FOI request)

The ABCC acknowledged receipt of the FOI request on 20 October 2017. In this email the ABCC also informed you that, pursuant to section 15(5) of the FOI Act, the ABCC has 30 days to deal with an FOI request.

It should be noted, however, that the FOI Act provides for processing times to be extended for particular purposes. As explained below, your request was extended for one such purpose.

Consultations: extended period, notice of decision and review rights

By a letter dated 3 November 2017, the ABCC notified you of an extended timeframe to process the FOI request pursuant to section 15(6)(a). The relevant section provides:

Extension of processing period to comply with requirements of section 26A, 27 or 27A

(6) Where, in relation to a request, the agency or Minister determines in writing that the requirements of section 26A, 27 or 27A make it appropriate to extend the period referred to in paragraph (5)(b):

- (a) the period is extended by a further period of 30 days; and
- (b) the agency or Minister must, as soon as practicable, inform the applicant that the period has been so extended.

The letter communicated to you that the required further time arose because it was appropriate to consult relevant parties.

Those consultations are now complete. However, for the purposes of notifying a decision to you and of disclosure of the relevant document that may follow, it should be noted that

relevant third-parties with whom we consulted are accorded review or appeal rights under the FOI Act. The relevant section is:

Under section 27A, "Consultation—documents affecting personal privacy":

Opportunity to make submissions

- (3) The agency or Minister must not decide to give the applicant access to the document unless:
 - (a) the person concerned is given a reasonable opportunity to make submissions in support of the exemption contention; and
 - (b) the agency or the Minister has regard to any submissions so made.
- (4) However, subsection (3) only applies if it is reasonably practicable for the agency or Minister to give the person concerned a reasonable opportunity to make submissions in support of the exemption contention, having regard to all the circumstances (including the application of subsections 15(5) and (6) (time limits for processing requests)).

Decision to give access

- (5) If the agency or Minister decides to give access to the document, the agency or Minister must give written notice of the decision to both of the following:
 - (a) the person concerned;
 - (b) the applicant.

Access not to be given until review or appeal opportunities have run out

- (6) However, the agency or Minister must not give the applicant access to the document unless, after all the opportunities of the person concerned for review or appeal in relation to the decision to give access to the document have run out, the decision to give access still stands, or is confirmed.

Note 1: The decision to give access to the document is subject to internal review (see Part VI), review by the Information Commissioner (see Part VII) and review by the Tribunal (see Part VIIA).

Note 2: For when all opportunities for review or appeal in relation to the decision to give access to the document have **run out**, see subsection 4(1).

...

(Original emphasis.)

In other words, this section provides that in respect of the relevant document, the review or appeal rights that are available to the consulted parties are to "run out" before access to the document is provided to the FOI applicant.

My decision in relation to the FOI request is set below. In summary, I have decided to disclose (subject to any review) an edited version of the document, with redactions of personal information.

Authority and material considered

I am authorised to make a decision under the FOI Act (s 23). This authority is derived from a delegation made by the ABC Commissioner on 8 September 2017. The delegation is accessible on the ABCC website (<https://www.abcc.gov.au/about/delegation-and-appointments>).

In reaching my decision I have had regard to:

- the terms of the FOI request;
- the FOI Act and particular provisions;
- the searches conducted, and records of such search, in respect of the FOI request;
- the relevant document found;
- the consultations taken by the ABCC under section 27A;
- the relevant guidelines issued by the Office of the Australian Information Commissioner (**OAIC**), including: Parts 3, 5 and 6; and
- relevant Tribunal and court decisions concerning the operation of the FOI Act.

Search and decision

I refer again to the FOI request: *'a letter to colleagues on his final day as head of the Australian Building and Construction Commission.'*

Relevant searches were conducted and one document was found to fall within the scope of the FOI request's terms. This document – **Document 1** - is listed in **Appendix A**.

Document 1 is an Internal ABCC article titled *'Message from the Commissioner – Farewell'* dated 27 September 2019.

My decision in relation to Document 1 is:

- Document 1 contains information that is conditionally exempt under the FOI Act.
- Information that falls under Part IV of the FOI Act may be exempt or conditionally exempt from access. For conditionally exempt information, the further public interest balance under section 11A (having regard to s 11B) is to be taken into account in deciding whether access is given.
- Given that Document 1 contains conditionally exempt information, I am persuaded that the public interest favours disclosure by only invoking section 22 of the FOI Act where an edited copy of Document 1 is disclosed.
- Therefore, I have decided that access to Document 1 may be facilitated under section 22 of the FOI Act.

What follows are the reasons for this decision.

Reasons for decision

Document 1 contains the personal information of a number of third parties and I have decided that the conditional exemption applies to information recorded in this document. Furthermore, I consider access to Document 1 should appropriately be facilitated pursuant to section 22 of the FOI Act. Disclosure is invoked under s 22 because it is reasonably practicable for the ABCC to provide an edited copy where the conditionally exempt information is removed from access.

I have made this decision following consultation with the third parties whose personal information is contained in Document 1.

The following sets out the relevant sections under FOI Act in relation to the partial release of Document 1.

Conditional exemption: section 47F of the FOI Act

Subsection 47F(1) provides:

A document is conditionally exempt if its disclosure under the Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

The term "personal information" is defined in section 4 of the FOI Act. The defined term under the FOI Act is given the same meaning as that under the *Privacy Act 1988* (Cth) (**Privacy Act**). That definition is provided for under section 6 of the Privacy Act:

Information or an opinion about an identified individual, or individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not.

(The "Note" referring to Section 187LA of the Telecommunications (Interception and Access) Act 1979 is omitted.)

It is clear that the personal information of a number of third parties is recorded in Document 1. Specifically, their names are expressly recorded.

Section 93A(2) of FOI Act relevantly provides:

(2) For the purposes of the performance of a function, or the exercise of a power, under this Act, regard must be had to any guidelines issued by the Information Commissioner under this section including, but not limited to, guidelines issued for the purposes of the following provisions:

- (a)...
- (b) subsection 11B(5) (public interest factors);
- (c) subsection 15(5A) (decisions on requests).

(Citation omitted.)

The guidelines issued by the OAIC offer the following (paragraphs 6.131 to 6.135):

What constitutes personal information will vary, depending on whether an individual can be identified or is reasonably identifiable in the particular circumstances. For particular information to be personal information, an individual must be identified or reasonably identifiable.

Where it may be possible to identify an individual using available resources, the practicability, including the time and cost involved, will be relevant to deciding whether an individual is 'reasonably identifiable'. An agency or minister should not, however, seek information from the applicant about what other information they have or could obtain.

Where it may be technically possible to identify an individual from information, if doing so is so impractical that there is almost no likelihood of it occurring, the information is not personal information.

...
Therefore, whether or not the individual is reasonably identifiable depends on the practicability of linking pieces of information to identify the individual.
(Citations omitted.)

I consider that this conditional exemption is applicable to Document 1. I consider that this exemption applies to the personal information of the following character:

1. the information is personal information because the persons are identified or reasonably identifiable (being expressly named in Document 1);
2. the personal information recorded in the document is not well known;
3. in connection with the preceding two points above, much of the recorded personal information in Document 1 is not publicly available.;
4. in addition to names, Document 1 also identifies a personal email address. In contrast, the ABCC specifically provides appropriate agency contact methods so that members of the public may contact its officers and staff regarding operational matters.

As observed by Forgie DP (at [126]) in *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission* (Freedom of information) [2017] AATA 269 (28 February 2017) (**Utopia**):

While an APS employee must act in accordance with the Code of Conduct and adhere to the APS Values, that does not equate with his or her being contactable on his or her private telephones or email by any member of the public at any time of the day or night. The same applies even if the numbers were related to telephone services provided to them by ASIC. **ASIC is entitled to put in place a means by which contact is made with its officers and a means by which members of the public are able to make contact to make complaints, convey information and so on. Against that background, it is unreasonable to disclose the contact details about the ASIC officers concerned.**

(Emphasis added.)

In summary, Document 1 contains information which is conditionally exempt under section 47F of the FOI Act. Document 1 discloses the personal information of certain current and former staff of the ABCC that has not been widely disclosed.

Public interest balance: section 47F

Section 47F is a conditional exemption whereby a consideration of the public interest balance is required, and having decided that section 47F applies to certain information, I must consider this balance. Relevant public interest grounds to be considered include:

- whether disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy;
- whether disclosure could potentially prejudice a person's safety or expose them to potential harassment or intimidation;

- whether disclosure will, in any way, inform debate on a matter of public importance or serve any public purpose.

Taking these matters and the public interest considerations into account, I consider the public interest favours against disclosure of certain personal information, particularly given the disclosure would involve an unreasonable impact on a person's privacy.

Privacy of other individuals

As stated above, I have formed the view that Document 1 discloses the personal information of certain current and former staff of the ABCC. The appearance of such personal information in Document 1 comprises of:

- the names of current and former staff of the ABCC;
- the personal email address of one of these individuals;
- opinions expressed about a number of these individuals by the author of Document 1.

I consider the disclosure of certain personal information would unreasonably impact the privacy of certain individuals. In this context it is relevant that some consultees have objected to their personal information being disclosed, and other consultees have objected to the entirety of Document 1 being disclosed.

Therefore, in my view, the disclosure of certain personal information would unreasonably impact their privacy.

Nevertheless, I consider the balancing test should be carefully taken and not applied restrictively in a way that the FOI Act does not promote. Particularly, where conditional exemptions apply to information that give rise to genuine concerns against disclosure, as this situation entails, a relevant wider view may assist in reaching the balance. This may include, for example, a consideration as to whether section 22 may be invoked as an appropriate measure that facilitates disclosure.

Section 22 provides:

- (1) This section applies if:
- (a) an agency or Minister decides:
 - (i) to refuse to give access to an exempt document; or
 - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
 - (b) it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:
 - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
 - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
 - (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
 - (i) the nature and extent of the modification; and

(ii) the resources available to modify the document; and

(d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

The agency or Minister must:

- (a) prepare the edited copy as mentioned in paragraph (1)(b); and
- (b) give the applicant access to the edited copy.

In other words, if an agency decides that the circumstances of subsection 22(1) exists, and further considers it possible for it to prepare a copy (an edited copy) of a relevant document "modified by deletion" (subject to subsection 22(1)(d)), the agency must prepare a copy and provide access.

The OAIC Guidelines provides, under the head of "Deleting exempt or irrelevant content from a document", that in applying section 22:

an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance¹.

I consider that it is practicable and possible for the ABCC to disclose an edited copy of Document 1 which removes exempt information and leaves it comprehensible to you in respect of your FOI request. This measure will relieve the genuine concerns I have outlined above.

My decision is set out in **Appendix A**. In summary, the personal information I propose to exempt (by way of redactions) from Document 1 comprises of the names of all consultees and the personal email address of one of these consultees.

No charges

I confirm that there are no charges for this FOI request.

Internal Review and Complaints

I am not the principal officer of the ABCC.

As a result, you are entitled to seek an internal review of my decision. You have 30 days from the date of this letter to seek an internal review application. You may do so in writing to: **Freedom of Information (ABCC)**, at either of the following contact addresses:

By post: GPO Box 9927 MELBOURNE VIC 3001 Australia

By email: foi@abcc.gov.au

¹ OAIC FOI Guidelines, paragraph 3.88.

Please note in your application the decision you wish to be reviewed.

You may also submit an information review request to the OAIC about the processing of your FOI request. More details are accessible from the OAIC's website: www.oaic.gov.au/

Access to documents

Section 27A(6) of the FOI Act provides that an agency must not give access to documents until all the opportunities a third party may have for review have run out, and the decision to give access still stands, or is confirmed. As such, we cannot disclose the documents to you until such time that the review period expires, being 30 days from the date of this decision.

If you have any questions about this matter, please contact the ABCC's FOI Section (contact addresses listed above).

Yours sincerely



Ben Vallence
Australian Building and Construction Commission

Appendix A: table of relevant documents

Reference	Date	Short description	Decision
Document 1	27 September 2017	Internal ABCC article titled 'Message from the Commissioner – Farewell'	Disclosure: release in part (s 22) - s 47F